Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

WHITE-RODGERS,
A DIVISION OF EMERSON ELECTRIC COMPANY,
Petitioner,

v.

FRED D. BITLER, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

ANDREW M. LOW
PETER J. KRUMHOLZ
DAVIS GRAHAM & STUBBS LLP
1550 Seventeenth Street
Suite 500
Denver, CO 80202
(303) 892-9400

THEODORE B. OLSON
Counsel of Record
THOMAS H. DUPREE, JR.
JEFFREY A. WADSWORTH
MARK A. PATTON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
(202) 955-8500

Counsel for Petitioner

QUESTIONS PRESENTED

In this product liability case, the Tenth Circuit held that plaintiffs' experts were properly allowed to testify under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), even though the experts failed to perform readily-available tests or otherwise connect their conclusions to the facts of this case. The questions presented are:

1. In performing its gatekeeping duty under *Daubert*, may a court consider an expert's conclusions, or must the court focus solely on the expert's methodology?

2. Does *Daubert*'s "fit" requirement demand a heightened level of relevance, or is it satisfied by meeting the general relevance requirement of Federal Rule of Evidence 401?

3. Where an expert's theory can be readily verified through testing, and where none of the other *Daubert* guideposts establish the theory's reliability, does a district court abuse its discretion by permitting the expert to present his untested theory to the jury?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The following individuals and entities were parties to the proceeding below:

Fred D. Bitler, Peggy A. Bitler, Colorado Compensation Insurance Authority, and White-Rodgers.

White-Rodgers is an unincorporated division of Emerson Electric Co. Emerson Electric Co. has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner White-Rodgers respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a), as amended on panel rehearing, is reported at 400 F.3d 1227. The original opinion, now withdrawn, was reported at 391 F.3d 1114. The order of the district court denying White-Rodgers's *Daubert* challenges (Pet. App. 28a-58a) is not reported.

JURISDICTION

The Tenth Circuit issued its original opinion on December 6, 2004. On February 9, 2005, the court issued an amended opinion upon panel rehearing and concurrently denied rehearing en banc. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED IN THIS CASE

Federal Rule of Evidence 401 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Federal Rule of Evidence 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

STATEMENT OF THE CASE

This is a classic case of "junk science," in which the district court permitted plaintiffs to base their claims on bogus, untested, and speculative expert testimony that should never have reached the jury. These experts theorized that a gas control manufactured by White-Rodgers malfunctioned and caused the propane gas explosion that injured plaintiff, even though the gas control worked perfectly when tested after the accident. White-Rodgers argued at trial and on appeal that these experts' opinions were inadmissible under *Daubert*, but the district court allowed them to testify and the Tenth Circuit affirmed, upholding a multimillion-dollar damage award.

The court of appeals' decision misapplies *Daubert*, relaxes the rigorous gatekeeping requirements established by this Court, and worsens an existing circuit split.

Plenary review is warranted to resolve the conflict in the circuits over whether a court may evaluate an expert's *conclusions* in assessing relevance and reliability, or only his *methodology*, as the Tenth Circuit did here. Review is further warranted to dispel the confusion in the lower courts over the proper application of *Daubert*'s requirement that an expert's opinion "fit" the facts of the particular case. Whereas most courts have interpreted the "fit" requirement as mandating a heightened standard of relevance, the Tenth Circuit in this case simply applied the basic relevance standard contained in Federal Rule of Evidence 401. Finally, this Court's guidance is necessary to make clear that a district court's discretion in applying *Daubert* is not unlimited and that where, as here, the expert's untested opinion fails to satisfy a single one of *Daubert*'s four tests for reliability, admission of that testimony is an abuse of discretion.

In product liability cases, juries are often charged with choosing between conflicting expert opinions in highly complex and technical areas. Because "expert witnesses have the potential to be both powerful and quite misleading," *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001) (internal quotation marks omitted), strict application of

Daubert's threshold reliability standards is essential. "While meticulous *Daubert* inquiries may bring judges under criticism for donning white coats and making determinations that are outside their field of expertise, the Supreme Court has obviously deemed this less objectionable than dumping a barrage of questionable scientific evidence on a jury, who would likely be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert's mystique." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999).

Particularly where, as here, the jury is confronted with claims brought by a severely injured individual against a large corporation, the risks are magnified that the jury may be influenced by sympathy, emotion or bias, and find it even more difficult to make an objective evaluation of an expert's opinion. In such circumstances, the district court's role as gatekeeper is crucial to ensuring that the expert testimony that reaches the jury is both relevant and reliable. Here, however, the district court and the Tenth Circuit largely abdicated the gatekeeping role, resulting in a multimillion-dollar verdict based on flawed and misleading "science."

1. On the evening of July 25, 1996, plaintiff Fred Bitler was severely injured in a propane gas explosion in the basement of his home. Pet. App. 3a.

A few days after the accident, an investigator for the property owner's insurer inspected the site of the explosion and tested the propane lines throughout the house. His testing revealed a leak in the basement at a T-connector in the copper line that supplied propane to a water heater. The investigator removed the water heater from the scene without further testing by unhooking the copper piping at its connection to the water heater. Pet. App. 35a.

White-Rodgers manufactured the propane gas control used in the water heater. The control, which regulates the flow of propane into the water heater, contains a safety valve that shuts off all propane to the pilot light and the main

burner if the pilot is extinguished. When the pilot is lit, the flame heats a thermocouple, creating an electric current that energizes an electromagnet that holds the safety valve open against the force of a spring and allows propane to flow to the pilot. If the pilot light goes out, however, the thermocouple is no longer heated and stops producing a current to energize the electromagnet, allowing the spring to snap the valve shut. The safety valve seat is made of rubber, which forms a seal against a circular metal surface when shut and blocks propane from flowing through to the pilot. Pet. App. 4a.

An early White-Rodgers design of the gas control proved susceptible to leaks in the safety valve. When large particles of copper sulfide occasionally entered the control, they could make their way to the safety valve and become caught between the rubber valve seat and the circular metal surface, thereby preventing the valve from closing fully when the pilot went out. Copper sulfide particles are a common contaminant in gas and propane lines. In 1978, White-Rodgers modified its gas control by installing a steel mesh screen at the inlet of the control to catch the larger particles of copper sulfide and other debris in the gas stream that had been causing the leaks. Pet. App. 4a.

Between 1978 and 1980, White-Rodgers manufactured 200,000 gas controls protected by mesh screens. The gas control in plaintiffs' hot water heater was one of these 200,000. Pet. App. 5a. The screens proved effective in stopping leaks caused by particles of copper sulfide and other debris. None of the other 200,000 controls in use throughout the world has ever been shown to leak due to such particles lodging on the safety valve seat.

In post-accident testing, the safety valve from plaintiffs' water heater worked as designed, snapping shut when it was supposed to, with no leak whatsoever. Pet. App. 5a. A later disassembly of the control revealed that the larger particles had been trapped against the outside of the mesh screen, and none were observed on or near the valve seat. Consistent with the design of the screen, which admits any particle

smaller than the openings in the screen, minuscule copper sulfide particles were observed to have entered the control, and some were found on the valve seat. *Id.* Apart from the assertions of plaintiffs' experts, there is no evidence that any of the tiny particles found inside the control were large enough to have prevented the safety valve from shutting properly when the pilot light extinguished.

2. In 1998, plaintiffs brought negligence and strict product liability claims in Colorado state court against White-Rodgers, A.O. Smith Corporation (the manufacturer of the water heater), and National Propane Corporation (the company that sold, installed, and serviced plaintiffs' water heating system and propane piping). Pet. App. 6a, 37a. After removing the case to federal district court on diversity grounds, defendants moved for summary judgment, challenging the admissibility of plaintiffs' proffered expert testimony on causation—an essential element to all of plaintiffs' claims. *Id.* at 6a, 37a, 38a.

Plaintiffs' lead expert on causation was Donald Sommer, an aviation engineer who had little or no experience with propane systems. His theory was that the White-Rodgers gas control leaked when copper sulfide particles passed through or around the mesh screen positioned at the inlet and, combining with grease on the seat of the safety valve, prevented the valve from shutting fully when the pilot light went out. Pet. App. 47a. Another expert, W. Alan Bullerdiek, gave a similar opinion. In arguing that Sommer's and Bullerdiek's opinions were irrelevant and unreliable, White-Rodgers pointed out that they had failed to validate their theory by testing whether such a small quantity of tiny particles, stuck to grease on the valve seat, was capable of causing the leak that led to this explosion.

The district court denied the challenge under *Daubert* and Rule 702.[1] The court reasoned that Sommer's theory

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[1] The district court's order was entered on March 3, 2000 and applied the then-current version of Rule 702, which was later amended effective

was not "novel" because *large* copper sulfide particles had been known to build up in other gas controls that did *not* contain mesh screens, thus preventing safety valves from closing fully. Pet. App. 50a. It explained that because Sommer used general "principles of physics" to explain how copper sulfide particles could move through a gas line, he did not need to test his conclusion that the particles on the valve seat in this particular case were of sufficient size to have caused a leak. *Id.* at 52a. The court found that Sommer's failure to test his theory did not bar its admissibility, commenting that defendants "place too much emphasis on a mechanical application of the *Daubert* factors." *Id.* at 48a. The court concluded that any shortcomings in Sommer's theory—such as his unsupported assumption that a combination of tiny particles and grease on the safety valve seat caused a leak—went to the weight of his testimony, rather than its admissibility. *Id.* at 55a.

The court also rejected White-Rodgers's *Daubert* challenge to plaintiffs' expert Elden Boh. The court found that Boh had "employed a sound methodology" based on his personal experience as a fire investigator in concluding that the most likely source of the propane that had caused the explosion was the gas control, rather than the leak he found at the T-connector in the basement. Pet. App. 44a. The court held that Boh's inability to determine how the gas control supposedly had leaked was irrelevant because he was only provid-

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[Footnote continued from previous page]

December 1, 2000. The pre-amendment version provided: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The Tenth Circuit did not specify which version of Rule 702 it was applying, but because the 2000 amendments to Rule 702 do "not alter the standard for evaluating the admissibility of experts' opinions as articulated" in *Daubert* and its progeny, the admissibility standards under new Rule 702 and its pre-amendment counterpart are the same. *Cooper*, 259 F.3d at 199 n.1.

ing a portion of the plaintiffs' evidence on causation and other experts could testify to the gas control's specific failure. *Id.* at 44a-45a. Finally, the court rejected White-Rodgers's other challenges because they "merely challenge[d] Boh's conclusions," which the court held were not relevant to determining the admissibility of expert testimony under *Daubert*. *Id.* at 45a.

3. At trial, Sommer and Boh explained that in reaching their conclusions in this product liability case, they had employed a "differential diagnosis" technique used by medical experts to pinpoint the cause of the explosion, by eliminating other potential causes until they were left with only one possibility. Pet. App. 15a-16a. For example, when asked whether the source of the propane leak could have been the T-connector—which, unlike the safety valve, was actually shown to have been leaking—Sommer testified that he excluded the T-connector as a potential cause because he "couldn't come up with an answer" for how it would have started leaking prior to the explosion. Reporter's Transcript 190. Thus, Sommer concluded that the T-connector was *not* the cause, even though post-accident testing showed it was leaking, and concluded that the safety valve *was* the cause, even though post-accident testing showed the safety valve was not leaking.

Sommer did not dispute that post-accident testing showed that the safety valve worked perfectly. However, he opined that copper sulfide contamination "leads to intermittent leaks," rendering the post-accident testing inconclusive in his view. Pet. App. 5a. Although Sommer easily could have tested his theory simply by actuating the valve repeatedly and checking each time for a leak, Sommer and plaintiffs' other experts opted not to test the safety valve themselves to establish whether this "intermittent"-leak hypothesis was defensible.

The jury rendered a verdict in plaintiffs' favor on their negligence and strict liability claims, awarding $2,319,429.27 in damages. The jury attributed fifty percent of the fault to

National Propane, forty percent to White-Rodgers, and ten percent to plaintiffs. Pet. App. 6a.

4. The Tenth Circuit affirmed, holding that plaintiffs' expert testimony was both relevant and reliable.[2] The court acknowledged the existence of *Daubert*'s four reliability factors—"(1) whether a theory has been or can be tested or falsified; (2) whether the theory or technique has been subject to peer review and publication, (3) whether there are known or potential rates of error with regard to specific techniques, and (4) whether the theory or approach has 'general acceptance,'" 509 U.S. at 593-94—but held that "these factors are most relevant in the context of a new and novel scientific theory." Pet. App. 9a. Thus, the "[f]ailure to consider one, or even any, of these factors . . . will not be dispositive of a district court's failure to fulfill its gatekeeping role." *Id.*

The court held that in determining reliability under *Daubert*, "a trial court's focus generally should not be upon the precise conclusions reached by the expert, but on the methodology employed in reaching those conclusions." Pet. App. 9a.

With regard to *Daubert*'s relevance requirement, the court explained that "[r]elevant evidence 'means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" Pet. App. 10a (quoting Fed. R. Evid. 401). Consequently, in applying *Daubert*'s requirement that there be a "fit" between the expert's opinion and the facts of the particular case, "[a] trial court must look at the logical relationship between the evidence proffered and the material issue that evidence is

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[2] The Tenth Circuit's original opinion issued on December 6, 2004. White-Rodgers petitioned for rehearing en banc, contending that the panel had misapplied *Daubert*. On February 9, 2005, the panel *sua sponte* granted rehearing, withdrew its opinion, and issued a new opinion "for the purpose of clarifying our language." Pet. App. 60a. In the same order, the court noted that en banc rehearing had been denied. The following discussion addresses the new panel opinion.

supposed to support to determine if it advances the purpose of aiding the trier of fact." *Id.*

Applying these standards, the court held that plaintiffs' expert testimony was properly admitted. With regard to Boh, the court approved the district court's determination that "Boh's methodology in reaching his conclusion about the cause of the explosion was sound." Pet. App. 12a.

With regard to Sommer, the Tenth Circuit acknowledged his failure to test his theory, but reasoned that the *Daubert* Court's citation to Karl Popper, *see Daubert*, 509 U.S. at 593, indicated that the testing factor "is aimed at theories purporting to explain the causal relations among regularly occurring natural phenomena," such as "Ptolemy's theory of the movement of celestial bodies which hypothesized that the Earth was the center of the solar system." Pet. App. 13a. Thus, "[w]hen an expert proposes a theory that modifies otherwise well-established knowledge about regularly occurring phenomenon, such as the normal ignition temperature of wood, we would expect the importance of testing as a factor in determining reliability to be at its highest." *Id.*

The court concluded that because Sommer did not challenge "well-established knowledge," such as the orbits of planets or the ignition temperature of wood, he did not need to test whether the tiny copper sulfide particles found on the valve seat were actually capable of holding the safety valve open in this particular case. *See* Pet. App. 13a ("[P]laintiffs' experts propose a theory about how the accident occurred given the known science of copper sulfide particulate contamination as a cause of propane gas leaks."). The court explained that "[w]hether the Bitlers established that the copper sulfide particles and grease found on the valve seat caused *this* accident is a matter the district court determined goes to the sufficiency of the evidence—not its scientific reliability." *Id.* at 14a (emphasis added). "The core science—that copper sulfide particles are the kind of thing that when lodged on the valve seat can cause leaks—is sufficiently well-established

that the district court did not abuse its discretion in finding it reliable." *Id.*

The court also held that Sommer's testimony satisfied *Daubert*'s "fit" requirement "because it involves a reliable method that would aid the jury in resolving a factual dispute." Pet. App. 19a. The court acknowledged White-Rodgers's objections that Sommer had failed to "fit" his opinions to the actual facts of this case, but stated that "[t]his argument confuses a *Daubert* inquiry into relevant 'fit' with the jury question of which theory, plaintiffs' or defendant's, best captures the truth of the matter at issue." *Id.*

Finally, the court noted that the experts' "differential diagnosis" approach is ordinarily used in medical cases and admitted that it "is not so clear . . . whether 'differential diagnosis' is an appropriate method when employed outside of the medical context," such as in a product liability case. Pet. App. 16a-17a. But the court concluded that "especially in light of our deferential standard of review," the district court did not err in admitting the testimony. *Id.* at 18a.

REASONS FOR GRANTING THE WRIT

This Court should grant review to resolve the circuit split over whether *Daubert* permits courts to assess an expert's conclusions—not just his methodology—in evaluating reliability. Review is also warranted to determine whether *Daubert*'s "fit" requirement is a mere Rule 401 relevance standard, or whether it is a heightened requirement that demands close scrutiny of the connection between the expert's opinion and the facts of the case. Finally, review is warranted to clarify the circumstances in which an expert must validate his theory through testing. As shown below, the circuits have interpreted *Daubert* in strikingly different ways, with some courts rigorously exercising their gatekeeping duties, and others, such as the court below, adopting a more liberal "let it all in" approach.

The Tenth Circuit misapplied *Daubert* and adopted an overly relaxed and deferential approach to the gatekeeping

requirement. Sommer's theory was that the minuscule particles found on the valve prevented it from closing and caused the explosion. But there is absolutely no scientific basis for this conclusion. Although it is well documented that *large* particles on the valve seat can cause a leak, it was completely novel to propose that grease plus the *tiny* particles present in this case could have caused a leak. Sommer's theory is akin to concluding that because a large boulder, bounding down a hillside, may be capable of crushing a passing car, a small pebble could do so as well.

At trial and on appeal, White-Rodgers pointed out that Sommer's theory could not be reconciled with the basic facts of this case, namely that (1) there was no evidence that any particles large enough to cause a leak had bypassed the mesh screen and reached the valve seat, (2) there was no evidence that the tiny copper sulfide particles that did reach the valve seat were actually capable of preventing the valve from sealing properly, and (3) the safety valve functioned properly when tested after the accident. Despite the obvious disconnects between Sommer's explanation and the facts of this case, the Tenth Circuit held that these sorts of gaps were irrelevant to the *Daubert* analysis and were questions for the jury.

The Tenth Circuit's decision conflicts with decisions from other circuits and cannot be reconciled with this Court's precedent. As this Court recognized in *Daubert*, because Rule 702 allows the presentation of "scientific, technical, or other specialized *knowledge*," an expert's opinion must be "more than subjective belief or unsupported speculation." 509 U.S. at 589-90. As a result, "[s]ince *Daubert*, . . . parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet." *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000). The Tenth Circuit's approach renders these "exacting standards of reliability" a virtual nullity and opens the gate to the admission of rank speculation masquerading as science.

I. THIS COURT SHOULD RESOLVE THE CONFLICT OVER WHETHER *DAUBERT* PERMITS CONSIDERATION OF AN EXPERT'S CONCLUSION.

The Tenth Circuit held that in determining reliability under *Daubert*, "a trial court's focus generally should not be upon the precise conclusions reached by the expert, but on the methodology employed in reaching those conclusions." Pet. App. 9a. Although the court seemingly recognized that "it is not always a straightforward exercise to disaggregate method and conclusion," *id.*, the court's analysis focused on the experts' methodology in assessing reliability, dismissing the fact that their conclusions were unsupported by testing or the evidence. Thus, in the Tenth Circuit's view, because "copper sulfide particles are the kind of thing that when lodged on the valve seat can cause leaks," the experts' general *methodology* was reliable and justified their testimony, even though the experts' *conclusion*—that microscopic particles combined with grease to hold open the safety valve and cause a leak in this particular case—was pure speculation. *Id.* at 14a. The court explained that challenges to the experts' conclusions were not relevant to the *Daubert* inquiry, but were properly left to the jury to decide. *Id.* at 19a (stating that White-Rodgers had "confuse[d] a *Daubert* inquiry . . . with the jury question of which theory, plaintiffs' or defendant's, best captures the truth of the matter at issue").

The federal courts of appeals have divided over the question of whether a district court may consider an expert's ultimate conclusion, as well as his methodology, in conducting the reliability analysis. Commentators have explicitly recognized the existence of the split. *See, e.g.*, Theresa M. Moore, Note, *Closing the Doors on Unsupported Speculation: Joiner's Effect on the Admissibility of Expert Testimony*, 33 Ind. L. Rev. 349, 355 (1999) (explaining that "a circuit court split developed" after *Daubert* on the issue of "whether a district court could exclude expert testimony that was based upon reliable methodology merely because the court did not

agree with the reliability of the expert's conclusion"); Ruth Saunders, Note, *The Circuit Courts' Application of* Daubert v. Merrell Dow Pharmaceuticals, Inc., 46 Drake L. Rev. 407, 422-23 (1997) (noting the "significant split among the circuits" on the question of whether a trial judge must "focus[] on the methodology used by the expert witness rather than the conclusions drawn by the expert").

Part of the confusion stems from arguably conflicting language in *Daubert* and *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). In *Daubert*, this Court remarked that the "focus" of a trial court's Rule 702 inquiry "must be solely on principles and methodology, not on the conclusions that they generate." 509 U.S. at 595. In *Joiner*, however, the Court stated that "conclusions and methodology are not entirely distinct from one another," and when there is "too great an analytical gap between the data and the opinion proffered," the opinion is properly excluded. 522 U.S. at 146.

The apparent tension between these two statements has resulted in different approaches among the circuits. Some courts, like the Tenth Circuit in this case, continue to adhere to *Daubert*'s mandate to focus solely on methodology, while other courts read *Joiner* as modifying *Daubert* and authorizing consideration of the expert's conclusions.

In addition to the Tenth Circuit, the Second Circuit and Eighth Circuit hold that the gatekeeping inquiry cannot take the expert's conclusions into account. For example, in *Campbell v. Metropolitan Property and Casualty Insurance Co.*, 239 F.3d 179, 186 (2d Cir. 2001), the court applied *Daubert*'s language that a district court must focus "solely on . . . methodology, not on the conclusions that they generate" in holding that gaps or inconsistencies between an expert's reasoning and his conclusion do not affect the testimony's admissibility. Similarly, in *Smith v. BMW North America, Inc.*, 308 F.3d 913, 919 n.9 (8th Cir. 2002), the court rejected a reliability attack premised on the expert's conclusions, holding that "[u]nder *Daubert*, a court should review only the methodology of the expert, not his or her

conclusion." *See also Bonner v. ISP Technologies, Inc.*, 259 F.3d 924, 932 (8th Cir. 2001) (rejecting *Daubert* challenge and holding that "because [the expert's] methodology was scientifically valid," questions about his resulting conclusions were for the jury).

In sharp contrast to this approach is the approach followed by the Third Circuit, which has construed *Joiner* as modifying *Daubert*'s holding and permitting consideration of an expert's conclusion. For example, in *Heller v. Shaw Industries, Inc.*, 167 F.3d 146 (3d Cir. 1999), the court squarely held that district courts must "examine the expert's conclusions in order to determine whether they could reliably follow from the facts known to the expert and the methodology used." *Id.* at 153. Thus, "[w]hile the district court may not reject an expert's conclusion simply because the court finds it wanting, it is surely within the court's province to ensure that the conclusion, particularly a medical expert's ultimate conclusion on causation, 'fits' with the data alleged to support it." *Id.* at 158. *See also In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 746 (3d Cir. 1994) ("a challenge to 'fit' is very close to a challenge to the expert's ultimate conclusion about the particular case, and yet it is part of the judge's admissibility calculus under *Daubert*").

Like the Third Circuit, at least two other circuits have recognized that district courts can evaluate an expert's conclusion before determining whether the testimony is sufficiently reliable to be admitted. *See, e.g., Ruiz-Troche v. Pepsi-Cola of Puerto Rico Bottling Co.*, 161 F.3d 77, 81 (1st Cir. 1998) (after *Joiner*, "trial judges may evaluate the data offered to support an expert's bottom-line opinions to determine if that data provides adequate support to mark the expert's testimony as reliable"); *Domingo v. T.K.*, 289 F.3d 600, 606-07 (9th Cir. 2002) (holding that the studies on which the expert relied "do not . . . provide support for his conclusion," and thus his testimony was properly excluded).

This Court should grant review and hold that the Tenth Circuit erred by refusing to evaluate whether the conclusions

of plaintiffs' experts were supported by the facts of this case. *Joiner* suggests that in many cases, an expert's reliability cannot adequately be assessed absent consideration of the expert's ultimate conclusion. As this Court explained:

> [C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

522 U.S. at 146.

Under the Tenth Circuit's erroneous approach, an expert can evade the *Daubert* inquiry and offer a patently flawed conclusion to the jury as long as he can claim that his methodology is based on Newton's laws or well-settled principles of physics. *Daubert* and *Joiner* plainly require more: the fact that large copper sulfide particles are "the kind of thing" that have been shown to cause leaks, Pet. App. 14a, does not entitle an expert to offer a conclusion that minuscule particles also can cause leaks absent evidence that supports this conclusion.

II. REVIEW IS WARRANTED TO CLARIFY WHETHER *DAUBERT*'S "FIT" REQUIREMENT DEMANDS MORE THAN MERE RELEVANCE.

The Tenth Circuit also misapplied *Daubert*'s relevance standard. As shown above, plaintiffs' experts were unable to present a theory of causation that accounted for the actual facts of this case. All they could do was extrapolate from general principles to offer specific conclusions that were demonstrably suspect.

The Tenth Circuit affirmed the admission of this expert testimony by construing *Daubert*'s "fit" requirement as de-

manding nothing more than a showing of mere relevance under Federal Rule of Evidence 401. Pet. App. 10a. Specifically, the court stated that the "fit" requirement calls upon "[a] trial court [to] look at the logical relationship between the evidence proffered and the material issue that evidence is supposed to support to determine if it advances the purpose of aiding the trier of fact." *Id.* The court deemed the "fit" requirement satisfied in this case because the experts' testimony "would aid the jury in resolving a factual dispute." *Id.* at 19a.

As shown below, the Tenth Circuit's interpretation of the "fit" requirement cannot be reconciled with *Daubert* and its progeny, and exacerbates the confusion in the lower federal courts over how to evaluate the relevance of expert testimony.

A. The Ruling Below Conflicts With Decisions Of This Court.

In *Daubert*, this Court held that expert testimony must be not just "reliable" but also "relevant" in order to be admitted under Federal Rule of Evidence 702. 509 U.S. at 589. The Court made clear that "relevance" for purposes of expert testimony under Rule 702 is different and more demanding than "relevance" for purposes of non-expert testimony under Rule 401. Specifically, Rule 702 imposes a heightened relevance standard that requires "a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* at 592. The Court labeled this increased level of relevance "fit." *Id.* at 591.

Joiner elaborated on and strengthened the "fit" requirement. In that case, the Court emphasized that experts must rely on data or studies that can sufficiently support their opinions based on the particular facts at issue. As the Court explained, "[t]he issue was whether *these* experts' opinions were sufficiently supported by the . . . studies on which they purported to rely." 522 U.S. at 144.

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court again held that expert testimony must "fit" the par-

ticular facts of the case. Thus, regardless of whether the approach used by a tire expert was reasonable "in general," the salient question "was the reasonableness of using such an approach, along with [the expert's] particular method of analyzing the data thereby obtained, to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant*." *Id.* at 153-54. Put differently, "[t]he relevant issue was whether the expert could reliably determine the cause of *this* tire's separation." *Id.* at 154.

Daubert, *Joiner* and *Kumho Tire* demonstrate that admissible expert testimony must be more than merely relevant in the Rule 401 sense. They hold that experts are not permitted to offer opinions that do not "fit" the particular facts of the case. *See Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055 (8th Cir. 2000) (noting the "renewed emphasis" that *Joiner* and *Kumho Tire* have put "on the importance of the 'fit' of an expert's opinion to the data or facts in the case").

The Tenth Circuit's approach to "fit" cannot be reconciled with these decisions. Sommer's opinion that copper sulfide particles built up on the safety valve seat in this particular case and prevented the valve from snapping shut when the pilot light went out was nothing more than rank speculation. He never determined whether the tiny copper sulfide particles, together with grease on the valve seat, were capable of holding the valve open. Nor did he ever determine whether particles that might have been large enough to cause a leak could have passed through or around the mesh screen. Nor, after the safety valve proved to be working properly in post-accident tests, did Sommer continue to test that valve to see if it would "intermittent[ly]" fail, as he hypothesized. Pet. App. 5a.

Instead, he based his testimony on the fact that (1) some tiny copper sulfide particles were found in the gas control area and on the safety valve seat, and (2) large copper sulfide particles have been known in other instances—instances involving gas controls *without* a mesh screen—to collect on

safety valve seats to prevent them from closing properly. Leaping from that general data to the conclusion that far smaller copper sulfide particles prevented the safety valve from closing in *this* case constitutes "too great an analytical gap," *Joiner*, 522 U.S. at 146, to satisfy the "fit" requirement. "The relevant issue was whether the expert could reliably determine the cause of *this* [propane gas explosion]," *Kumho Tire*, 526 U.S. at 154, and the Tenth Circuit's approach—allowing experts to testify based on a mere showing of general relevance—conflicts with this Court's precedent.

B. The Ruling Below Adds To The Confusion In The Lower Federal Courts Over *Daubert*'s Relevance Prong.

The federal courts of appeals have not applied a consistent approach in determining whether an expert's testimony sufficiently "fits" with the facts of the case to be admissible under *Daubert*'s heightened relevance standard. Prior to the Tenth Circuit's holding in this case, at least two separate interpretations of relevance for purposes of expert testimony had developed: some courts ignore the "fit" requirement altogether and cite only to Rule 401's definition of relevance, whereas other courts require a close connection between the expert's conclusion and the facts of the case. The Tenth Circuit's approach, which relies on Rule 401 while still purporting to consider "fit," adds a third approach to an already uncertain legal landscape.

The Second Circuit has repeatedly taken the first approach. In articulating the relevance inquiry called for under *Daubert*, that court has regularly disregarded the notion of "fit" and cited only to Rule 401. *E.g.*, *Campbell v. Metro. Prop. and Cas. Ins. Co.*, 239 F.3d 179, 184 (2d Cir. 2001) (quoting Rule 401's definition of relevance and not discussing "fit" at all); *Zuchowicz v. United States*, 140 F.3d 381, 387 (2d Cir. 1998) (not discussing "fit" in holding that so long as an expert's opinion is based on a reliable methodology it should be admitted). This approach is flatly contrary to *Daubert* and its progeny.

The second approach has been more commonly followed. In *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), for example, the Third Circuit squarely held that under *Daubert*, "the standard for fit is higher than bare relevance." *Id.* at 745 n.13. The court explained that "fit" requires "that the scientific knowledge must be connected to the question at issue." *Id.*[3] Like the Third Circuit, the Eleventh Circuit has contrasted the "liberal admission of evidence" standard reflected in Rules 401 and 402 with *Daubert*'s "more stringent standards of reliability and relevance." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999).

The First Circuit similarly has described *Daubert* as imposing a "special relevancy requirement," known as "fit." *Ruiz-Troche v. Pepsi-Cola of Puerto Rico Bottling Co.*, 161 F.3d 77, 81 (1st Cir. 1998). "To be admissible, expert testimony must be relevant not only in the sense that all evidence must be relevant, *see* Fed. R. Evid. 402, but also in the incremental sense that the expert's proposed opinion, if admitted, likely would assist the trier of fact to understand or determine a fact in issue." *Id.*; *see also Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581, 584 (5th Cir. 2003) (articulating the heightened Rule 702 relevance requirement in nearly identical terms).

The Tenth Circuit combined these two distinct approaches identified above and created a separate hybrid approach. Like the Second Circuit, it first defined "relevance"

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[3] Since 1985, the Third Circuit has been a leading contributor to the law governing questions of the admissibility of expert testimony. In *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985), the court correctly anticipated this Court's 1993 decision in *Daubert* and rejected the then-prevailing *Frye* test as the proper standard for admissibility of expert testimony. *See id.* at 1237. The *Downing* court also held that Rule 702 requires proffered expert testimony to be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Id.* at 1242. Judge Becker described this concept as a question of "fit," *id.*, and this Court later adopted that term in *Daubert*. *See Daubert*, 509 U.S. at 591.

for purposes of *Daubert* under the Rule 401 formulation. The court then purported to apply a "fit" requirement to the plaintiffs' experts' theory, but misconstrued the requirement to allow the admission of expert testimony that plainly did not account for the particular facts of this case.

The Tenth Circuit's loose approach to relevance conflicts with the approaches of other courts. For example, in *McDowell v. Brown*, 392 F.3d 1283 (11th Cir. 2004), the Eleventh Circuit upheld the exclusion of expert opinions that consisted of guesswork, rested on untested theories, and "leap[t] from . . . accepted scientific premise[s] to . . . unsupported one[s]." *Id.* at 1300-01. The court was considering the admissibility of medical expert testimony on causation that "essentially boil[ed] down to an opinion that earlier surgical intervention would [have been] preferable." *Id.* at 1301 (internal quotation marks omitted). The court explained that the experts "made the leap from this presumably accepted scientific principle to an unsupported scientific principle that a delay of more than four hours caused [the plaintiff's] injuries." *Id.* at 1302 (internal quotation marks omitted). Because "[t]his 'leap of faith' was supported by little more than the fact that early treatment begets improved recovery" and the experts "provided no existing research detailing the extent of injury or recovery at different time intervals," the proffered medical theories were neither reliable nor did they "'fit' as evidence relevant to the cause of the plaintiff's injuries." *Id.* at 1301-02.

Here, Sommer's theory that copper sulfide particles can gather in sufficient quantities so as to jam safety valves may be an accepted scientific principle as far as it goes, but it does not answer the question of what quantities would be sufficient to cause such a jam—or whether there were copper sulfide particles large enough to cause a jam in plaintiffs' valve. Nor was Sommer able to overcome that gap through evidence that tiny copper sulfide particles were discovered in plaintiffs' gas control. Because he did not know whether those tiny particles were actually capable of holding open the spring-actuated valve, Sommer's conclusion to that effect

was simply his "subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590. Under the Eleventh Circuit's rigorous approach to "fit" as reflected in *McDowell*, Sommer's opinion would have been excluded.

The Tenth Circuit's decision is also at odds with the Eighth Circuit's application of the "fit" requirement in *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000). In that case, the Eighth Circuit overturned the admission of an expert's testimony in an antitrust case because the expert failed to incorporate all of the relevant circumstances into his analysis. The court first explained that "expert testimony must not only be based on reliable science but must also 'fit' the particular facts of the case," and "[i]f a party believes that an expert opinion has not considered all of the relevant facts, an objection to its admission is appropriate." *Id.* at 1055-56. "Even a theory that might meet certain *Daubert* factors, such as peer review and publication, testing, known or potential error rate, and general acceptance, should not be admitted if it does not apply to the specific facts of the case." *Id.* at 1056 (internal footnote omitted). Accordingly, because the expert's opinion was "deficient" in that it did not account for "all aspects of the economic reality" in the relevant market, "the expert's resulting conclusions were mere speculation" and should have been excluded. *Id.* at 1057 (internal quotation marks omitted). Here, Sommer similarly ignored the relevant circumstances in reaching his speculative conclusion about causation. His theory failed to explain how tiny specks of copper sulfide—as opposed to large particles—could possibly have prevented the safety valve from slamming shut.

These cases illustrate that courts are applying different relevance standards and different approaches to *Daubert*'s "fit" requirement. Review by this Court is warranted to dispel the confusion and make clear that the Tenth Circuit's relaxed approach is inconsistent with *Daubert*'s rigorous gatekeeping requirements.

III. REVIEW IS WARRANTED TO CLARIFY WHEN TESTING IS NECESSARY TO PROVE RELIABILITY.

This Court has recognized that district courts have discretion to determine which of *Daubert*'s four reliability factors to apply in any given case. Here, the district court and Tenth Circuit excused plaintiffs' experts from actually testing their theory, even though such testing was readily available and would have confirmed the validity (or lack thereof) of their opinions. This case demonstrates the need for this Court to clarify that a district court does not have unlimited discretion to dispense with *Daubert*'s reliability guideposts. This Court should hold that where, as here, testing could easily have been performed and would have quickly confirmed whether plaintiffs' causation theory—and thus their entire case—had any merit, the district court abused its discretion by allowing the presentation of untested opinions.

In *Daubert*, the Court placed special emphasis on testing, holding that "[o]rdinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested." 509 U.S. at 593. Because "'[t]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability,'" it follows that "'[t]he statements constituting a scientific explanation must be capable of empirical test.'" *Id.* (quoting K. Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* 37 (5th ed. 1989) and C. Hempel, *Philosophy of Natural Science* 49 (1966)). Courts have generally recognized the testing factor as "*Daubert*'s most significant guidepost." *Chapman v. Maytag Corp.*, 297 F.3d 682, 688 (7th Cir. 2002).

Likewise, in *Kumho Tire*, the Court held that, although all four *Daubert* factors may not be applicable in every case, "a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony." 526 U.S. at 152. Three members of this Court joined in a concurring opinion to emphasize that

trial courts must not abdicate their gatekeeping function, and added that "[t]hough, as the Court makes clear today, the *Daubert* factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion." *Id.* at 159 (Scalia, J., concurring, joined by O'Connor & Thomas, JJ.).

This is such a case. In excusing the plaintiffs' experts' failure to test, the Tenth Circuit did *not* find that testing would have been difficult or burdensome. Rather, the court explained that *Daubert*'s testing factor is "aimed at theories purporting to explain the causal relations among regularly occurring natural phenomena," such as "the movement of celestial bodies." Pet. App. 13a. Thus, because plaintiffs' experts were not "propos[ing] a theory that modifies otherwise well-established knowledge about [a] regularly occurring phenomenon," and because large copper sulfide particles have been known to cause leaks in other cases, the need for testing was relaxed. *Id.*

This reasoning cannot be reconciled with *Daubert* and *Kumho Tire*. Those cases do not suggest that experts are excused from testing their theories so long as they are not seeking to "modif[y] otherwise well-established knowledge." Pet. App. 13a. Indeed, such an approach deprives the gatekeeping requirement of almost any constraining force, in that virtually any expert could justify his failure to test simply by asserting that his theory did not seek to modify or overturn Newton's laws of physics.

Moreover, contrary to the Tenth Circuit's view, plaintiffs' experts were not simply offering testimony on the general question of whether "copper sulfide particles are the kind of thing that when lodged on the valve seat can cause leaks." Pet. App. 14a. Before being admitted as reliable testimony, their theory should have been tested to ensure that there was a scientifically supportable basis to support their conclusion

that tiny copper sulfides built up to cause a leak in *this* case. *Cf. Kumho Tire*, 526 U.S. at 154.[4]

Numerous courts have required testing in circumstances very similar to those presented here. In *Chapman*, for example, the Seventh Circuit held that an expert's failure to test his theory in a product liability case rendered it inadmissible and required reversal. The court explained:

> In our opinion, the absence of any testing indicates that [the expert's] proffered opinions cannot fairly be characterized as scientific knowledge. Personal observation is not a substitute for scientific methodology and is insufficient to satisfy *Daubert*'s most significant guidepost. [The expert's] opinions amount to nothing more than unverified statements unsupported by scientific methodology.

297 F.3d at 688.

Other courts have similarly placed a heavy emphasis on testing, particularly in product liability cases. *See, e.g., Watkins v. Telsmith, Inc.*, 121 F.3d 984, 992 (5th Cir. 1997) (excluding product liability expert who failed to test); *Am. & Foreign Ins. Co. v. Gen. Elec. Co.*, 45 F.3d 135, 139 (6th Cir. 1995) (same); *Cummins v. Lyle Indus.*, 93 F.3d 362, 368 (7th Cir. 1996) ("Our cases have recognized the importance of testing in alternative design cases."); *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 297 (8th Cir. 1996) (excluding expert who failed to test); *Cabrera v. Cordis Corp.*, 134 F.3d 1418, 1423 (9th Cir. 1998) (excluding expert who failed to test in product liability case).

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[4] Testing would have been particularly appropriate in this case because the experts' use of "differential diagnosis" was suspect. In fact, their "differential diagnosis" approach has apparently never been endorsed outside the medical context—a point acknowledged by the Tenth Circuit, Pet. App. 16a-17a—and has been squarely rejected by at least one court as an inappropriate way to determine the cause of a propane gas explosion. *See Stibbs v. MAPCO, Inc.*, 945 F. Supp. 1220, 1224 (S.D. Iowa 1996).

These differing approaches to *Daubert*'s gatekeeping requirements can and do lead to widely varying outcomes among the circuits when an expert seeks to offer an untested theory. Particularly in product liability cases, where the plaintiff's (or the defendant's) entire case often depends on expert testimony concerning causation or defect, guidance from this Court is needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW M. LOW
PETER J. KRUMHOLZ
DAVIS GRAHAM & STUBBS LLP
1550 Seventeenth Street
Suite 500
Denver, CO 80202
(303) 892-9400

THEODORE B. OLSON
Counsel of Record
THOMAS H. DUPREE, JR.
JEFFREY A. WADSWORTH
MARK A. PATTON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
(202) 955-8500

Counsel for Petitioner

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